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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN A. WALSH, JR. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE, JOHN A. WALSH, JR.

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OPINION BELOW

The opinion and order of the district court (R. 15-19) are reported at 262 F.Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal to this Court was filed on February 6, 1967, and probable jurisdiction was noted on May 29, 1967 (387 U.S. 929; R. 25). The government invokes the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, *shall be punished* (1) *by death* if the kidnaped person has not been liberated unharmed, and *if the verdict of the jury shall so recommend, or* (2) *by imprisonment for any term of years or for life, if the death penalty is not imposed.* (Emphasis added)

QUESTION PRESENTED

Whether the Federal Kidnaping Act, 18 U.S.C. 1201(a), is void under the Sixth Amendment because it provides for the death penalty (in cases where the victim has been harmed) "if the verdict of the jury shall so recommend," but does not allow the death penalty otherwise.

STATEMENT

Respondents were indicted on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecicut, to Alpine, New Jersey, in violation of 18 U.S.C. 1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the victim was harmed when liberated. (R. 1)

Appellee Walsh moved to dismiss the indictment on the grounds that Sec. 1201 put the defendant to an unconstitutional choice in that it immunizes those who plead guilty against a death penalty and requires those defendants who

demand a trial to choose a jury trial at the risk of their lives. The district court (Judge Timbers, Connecticut District) ordered count one of the indictment dismissed on the ground that the statute, in permitting the death penalty only upon recommendation of jury and making such a recommendation mandatory, tended to deprive defendants of their "fundamental Sixth Amendment right to trial by jury" (R. 17). The court reasoned that if defendants claim trial by jury "they must risk their lives," whereas if they waive a jury or plead guilty, that "risk is at least substantially reduced" because the judge in the latter case has discretion not to convene a jury and thus to eliminate the risk of a death penalty. Even if a court after accepting a guilty plea has authority to convene a jury to determine punishment, the court held "that power is discretionary, its exercise uncertain" (R. 18). The court, however, found it unnecessary to decide whether a judge who accepts a guilty plea has any authority to convene a jury to impose the death sentence, an issue upon which, the court noted, the circuit courts are divided.

The court found that one who waives a jury trial or pleads guilty substantially reduces, if he does not avoid entirely, the risk of a death sentence. The court concluded that the exercise of one's Sixth Amendment rights were made "no less costly" by Sec. 1201 than the assertion of one's Fifth Amendment right not to testify was made costly by comment in *Griffin v. California*, 380 U.S. 609, 614. It therefore held that Sec. 1201(a) is invalid "to the extent that it impairs defendants' free exercise of their right to trial by jury" (R. 18).

ARGUMENT

INTRODUCTION AND SUMMARY

To a defendant accused of a capital crime, any factor which affects the risk of capital punishment is material. Any variation in the degree of that risk is significant. If the assertion of a constitutional right is made a factor tending to increase the risk of death, the exercise of that right is inevitably discouraged. The government's brief does not seriously contend that the statute, as it was read by the court below, does not significantly burden the assertion of one's right to trial by jury. The appellant's real argument is that the court below and the appellees here have misread the Kidnapping Act. In fact, says the appellant, under the provisions governing the imposition of capital punishment, a defendant's exercise of his right to be tried, and/or to be tried by a jury does not "materially" increase the likelihood of capital punishment. Therefore the exercise of those rights is not significantly burdened. An argument hedged with words like "materially" is suspect in any context. In the present context it signals the need for careful scrutiny before the government's bland assurances are accepted. In fact, when the various hypothetical situations which might arise are examined, the very real and chilling impact of this law upon the exercise of the right in question becomes clear.

As we read 1201(a) it provides a mandatory death sentence if the jury which passes on the issue of guilt so recommends, but under no other circumstances. In that situation the accused stands forewarned that assertion of his right to a jury trial may cost him his life. Not even the district judge could relieve that sentence without throwing out the entire conviction and ordering a new trial. But if the accused will waive his right to a jury he is saved — at least he avoids the death penalty. It can hardly be doubted that

in this situation there exists a burden on the assertion of a constitutional right falling within the prohibition of *Griffin v. California*, 380 U.S. 609 (1965).

The appellant argues, however, that the jury's recommendation is not mandatory. In order for the appellant to be correct the clear language of the statute and the thrust of its subsequent amendments must be disregarded. Furthermore, the purpose which the appellant claims for the jury's role under 1201(a) — to relieve the court of the onus attached to the imposition of capital punishment — would be thwarted. Yet even if the appellant's view were sustained, the effect on a defendant's free choice is little changed. He is still induced to avoid the risk, though that risk may be somewhat reduced. If he guesses wrong the price remains high.

The appellant goes still further however, and, having argued that the most humane construction should be given to the statute, reverses field to argue that a statute permitting the death penalty only "if the verdict of the jury shall so recommend" authorizes the court to convene a special jury solely for the purpose of hanging the defendant. The jury thus humanely recommended by the appellant is one whose members, if they are at all alert, will realize that in all probability the judge would not have convened them unless he was of the opinion that the defendant should suffer capital punishment. Furthermore, to assist the defendant in presenting his mercy plea before this impartial and independent jury, many of his procedural and substantive rights are thrown into doubt. All this, the government claims, is authorized by a statute whose capital provisions are supposedly designed to mitigate the risk of death. The only words to be found in 1201(a) which might arguably be thought broad enough to encompass such a procedure are "the jury." But to give those two words such an expansive

meaning in the present context would be to stretch them much too far. The word "jury" brings to the mind of any legislator or layman, and to most lawyers and judges, the image of a fact-finding body charged with the determination of guilt, before which the accused stands possessed of his rights, and before which is presented only that evidence which judicial experience has shown to be reliable, fair and probative. In the absence of evidence that anything more was meant, the term should be confined to its more customary usage.

Should such a sentencing jury nevertheless be thought permissible, the defendant's dilemma remains totally unresolved if the jury's recommendation is mandatory. The defendant must seek the opportunity for the exercise of the court's discretion not to convene the jury. This can be done only by waiving the right to a jury trial.

Even if all the appellant's assumptions were conceded, a significant increase in the risk of death would attend the exercise of the defendant's rights. If a jury trial is elected, the defendant can seek mercy first from the jury and, failing there, from the court. But if he waives the jury or pleads guilty he secures a third chance for mercy — once when the court decides whether to convene a jury, again when the jury deliberates, and a third time when the court decides whether to accept the jury's recommendation. Furthermore, if he desires a jury, the defendant must run the risk that the protections of even the two-step process will be lost as a result of the court's deference to the jury's sovereignty. Finally, the accused may waive his rights in the hope, not that he will be shown special clemency, but that the complexity of the procedure whereby death might be decreed will spell the difference in the court's decision not to commence a new trial for that purpose.

The enumerated penalties which attach to the assertion of one's right to trial and to be tried by a jury are the issues at stake. The issue is not the future of plea bargaining nor the flexibility of the federal system of criminal justice. The unconstitutional burdens complained of are relevant to the plea bargain insofar as they constitute improper and abusive weapons in the prosecutor's hands. For the most part these pressures exist even where the state makes no attempt to strike a bargain. They are inherent in the law as it stands. The death penalty, rather than serving as a punishment for proven crimes, becomes an automatic weapon for securing convictions.

If we are correct as to the effect of this statute, then, under the past decisions of this and other courts in analogous situations, the dilemma confronting a defendant under the Kidnapping Act constitutes an unconstitutional burden on the free exercise of his fundamental rights.

The appellant contends that, even if the offending section is unconstitutional as it stands, this Court can remedy that infirmity by selectively striking from the statute any reference to capital punishment. Appellees might agree that this is one alternative which the body charged with making such decisions would consider. But it is not the only alternative, nor necessarily the best one. Perhaps the better course is to call special sentencing juries in all cases, regardless of the plea. Or the court might be empowered to act alone in imposing capital punishment. Or a trial by jury could be required in all capital cases arising under this section. The choice belongs to the legislature. Congress wrote this law, a law which has now proven to be unconstitutional. Congress should re-enact the statute in a new form if that is desired. This Court is not required to weave through the subsections and sub-subsections of the offending statute in order to rewrite it in acceptable form.

I. *THE PROVISIONS OF THE KIDNAPPING ACT GOVERNING THE IMPOSITION OF CAPITAL PUNISHMENT, HOWEVER CONSTRUED, BURDEN AND PENALIZE THE ASSERTION OF A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS, EXPOSING HIM TO THE RISK OF A GREATER PENALTY OR AT LEAST TO A GREATER RISK OF A HARSHER PENALTY IF HE EXERCISES THEM.*

18 U.S.C. 1201(a), if its language is to be given the construction of ordinary usage, causes the death sentence to be mandatory where a jury's verdict so recommends. Conversely, as all parties to this appeal agree, a death sentence cannot be imposed at all absent a jury's recommendation.

The necessary effect of this provision on a defendant charged under its terms is obvious. If he enters a plea of not guilty and claims his right to a jury trial he faces the risk of a jury's mandatory recommendation of capital punishment. By choosing a trial to the court or entering a plea of guilty, however, he can completely eliminate that risk, as the court has no authority to impose a capital sentence. Thus a great disadvantage is attached to the assertion of his right to a trial by a jury.

In its brief, the United States argues several points which, it is claimed, permit the Court to avoid the issue of whether the dilemma posed to defendants, as set forth above, violates the Constitution. These points, says the government, reveal that a defendant charged under the Kidnapping Act who elects a jury trial does not thereby "materially" increase the likelihood that capital punishment will be imposed.

The general position of the government is that, even if a defendant waived his jury trial or pleaded guilty, he would

not necessarily escape the death penalty. Therefore the procedure governing the imposition of capital punishment provides no particular inducement to waive the right to a jury trial. We contend, quite to the contrary, that even if it is assumed that the defendant does not have it within his power absolutely to prevent the imposition of the death penalty, nevertheless it is possible for him to reduce the risk of its imposition by waiving his constitutonal rights. The appellant, nevertheless, contends that the degree to which the accused can mitigate that risk is so slight that it does not result in a "material" burden on the exercise of his rights. That the appellant is incorrect can be demonstrated only by a closer examination of its argument.

The appellant's contention that no material burden is imposed on a defendant's freedom to choose a trial by jury is entirely dependent upon the establishment of two subsidiary points. First, the government argues that the jury's recommendation in favor of the death penalty is not binding on the court. The district judge, it is said, retains the discretion to disregard the jury's decision. Second, the appellant believes that, even when no jury sits on the issue of guilt because it has been waived by the defendant, the court may in its discretion convene a special jury for the sole purpose of deciding whether capital punishment should be imposed. We have pointed out below why the appellant is incorrect on both points. For the present, however, our purpose is to assess the extent to which the burdens apparently imposed by this statute on the free exercise of a defendant's rights are relieved in the event that the appellant is correct about either or both of these subsidiary issues. In our view, the defendant's dilemma survives even if both points were conceded.

First, assume that the appellant is correct on both issues — the jury's recommendation is not mandatory, and the

court is empowered to convene a special jury to authorize the death penalty. Even under these assumptions at least three powerful inducements for the defendant to waive his jury trial remain:

(1) The well known proclivity of many judges to accept a jury's judgment even where it differs from the court's own view raises before a defendant the spectre of a death sentence being imposed upon a jury recommendation which the court itself would not have imposed, and would therefore not have convened a jury to impose, had jury trial been waived. Thus, while it may appear to the government that, in theory, the defendant will receive the benefit of a two stage process in the imposition of sentence whether or not a jury passes on guilt, in actual practice the full benefit of a two-fold screening process may be available, or seem to a defendant to be available, only if a jury trial is waived or a guilty plea is entered.

(2) A second inducement to waive jury trial stems from the complexity of the procedure whereby a court may secure authority to impose the death penalty when a jury trial is waived. At least where the defendant chooses trial to the court, the fact that two trials are necessary to impose the maximum penalty reduces the likelihood that the court will force the defendant to face that risk. If, however, the accused asserts his right to a jury's judgment he is immediately subjected to having the issue of sentence passed upon. The appellant might respond to this point by arguing that since the government can insist upon a jury trial, the choice is not left to the defendant. Therefore, there is no reason to be concerned with inducement to waive a jury trial. If the prosecution seeks the death penalty, it can insist upon a jury trial. If it does not seek that penalty the defendant runs no increased risk. A closer examination, however, reveals that the defendant's dilemma remains a difficult one.

Under the assumptions of the government's argument, it is precisely in the situation wherein the government wishes to induce the defendant to waive a jury on the issue of guilt without giving up hope of securing capital punishment that this statute becomes coercive. Hoping that the court will be deterred from convening a second trial for sentencing because of the length and complexity of that procedure, the defendant is induced to succumb to the prosecutor's will without gaining the assurance that he is to be spared. He is induced not by the hope of leniency, but by the threat of a greater risk of a greater penalty resulting from the assertion of his constitutional right. Guilty or not, he must incur a greater risk of death to reach a jury.

(3) Third, the defendant, by waiving a jury or pleading guilty, can perhaps secure three opportunities to avoid imposition of a capital penalty — first when the court decides whether to convene a special jury, again when the jury considers its decision, and finally, after the jury has decided in favor of capital punishment. If he chooses a jury trial, however, the issue will be submitted to a jury as a matter of course, the court being called upon to exercise its discretion only once.

Thus even under the assumptions of the appellant's strongest argument, 18 U.S.C. 1201(a) significantly burdens the assertion of a defendant's constitutional right. If either of those assumptions is removed the grisly dilemma becomes still more clear cut.

Consider the burdens which arise if the appellant is correct in contending that the jury's recommendation is not mandatory, but is incorrect in thinking that the statute authorizes convening a sentencing jury. The defendant's dilemma in that situation is obvious. He is subjected to an extremely strong inducement to avoid a jury at all costs for, by so doing, he can absolutely avoid the imposition of the

death penalty. At the very least he will have to seek a court trial. But if the government refuses to concur, he will be forced to plead guilty to avoid the risk of the death penalty. Only if this plea is rejected will he face capital punishment. If it has been the prosecutor's wish to secure a guilty plea, however, there will be no one to argue against its acceptance. The notion that the trial court entirely on its own initiative will so supervise the entry of such pleas that none will enter by reason of this coercive arrangement is too far fetched and patently unreliable to warrant much debate. The only factor which at all mitigates the severity of a defendant's problems is the discretion left in the hands of the trial court to decline a jury's recommendation. That this discretion, if it exists, does little to ease the situation has been pointed out above. In fact, it provides a further inducement to waive one's rights in order to secure a three-fold review of the death penalty. It is to be hoped that not all courts will so firmly favor the defendant's death that nothing could be produced in proceedings before the special jury which could convince the court to reject the jury's recommendation.

Now consider the defendant's options if we assume the jury's recommendation to be binding on the court, contrary to the appellant's argument, but concede the court's power to convene a jury to pass sentence. The defendant's tactical dilemma militates still more strongly against the exercise of his right to a jury trial. In this situation, the accused is subjected to a risk which is unmitigated by the hope of leniency at the hands of the court unless a jury is waived or a guilty plea entered. Only by making such concessions can the defendant secure even the limited benefit of the two-tier process wherein both court and jury must concur in the penalty. The risk of death is not eliminated by either option available to the accused, but it is markedly reduced by waiving the right to a jury or to any trial at all.

If neither of the appellant's contentions is approved the statute operates at its coercive worst as we have argued at the beginning of this section. Not only do the comparative risks facing the accused become more disparate, but the surest means of minimizing the risk can be secured only by a drastic decision. The defendant must waive his right to be tried at all. If a jury trial is chosen the risk of a mandatory death sentence is incurred. Yet if the jury can be avoided, the issue is foreclosed and the risk eliminated. If trial to the court is chosen, the government's concurrence is necessary. Of course, if it has been the prosecutor's wish to secure a waiver by relying on the statute's implicit threat of death, the waiver will not be thwarted — whatever comfort that fact may be. But if the government's consent cannot be secured, the most likely way to preclude the death penalty would be to plead guilty. Only the court's discretionary power to reject the plea then stands in the way. Even where the government opposes the plea, the chances of avoiding the death penalty are improved.

A. *Under the Terms of the Statute, the Death Penalty is Mandatory When Recommended by the Jury.*

While it is certainly the wish of no defendant to face the risk of a mandatory recommendation of capital punishment, no reasonable reading of the language of 18 U.S.C. 1201(a) can avoid the conclusion that the section so provides.[1] The

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1 See *United States v. Curry*, 358 F.2d 904, 913-16 (2d Cir. 1965), wherein it is said that in statutes such as 18 U.S.C. 1201 Congress "has ameliorated the harshness of a mandatory death penalty by giving the jury discretion with respect to whether the death sentence shall be imposed." The *Curry* court seems to say that the penalty is ameliorated in that it becomes mandatory only if the jury so recommends, as compared to being mandatory automatically upon conviction. See also *Waley v. U. S.*, 233 F.2d 804, 806 (9th Cir. 1956), wherein it is said that the death penalty may be mandatory when recommended by the jury pursuant to this section.

crucial phrase reads, "shall be punished . . . by death . . . if the verdict of the jury shall so recommend."

The word "shall" is an imperative. It does not mean "may." But even if "shall" is thought to refer to alternative punishments, "by death . . . or by any term of years," the impression that judicial discretion is thereby authorized is quickly dispelled by the qualification attached to the latter alternative — "if the death penalty is not imposed." This final phrase is a pointless truism unless it refers to the outcome of the jury's recommendation. The court may impose a prison sentence unless the jury recommends death. That the language should not be thought mere surplusage is revealed by the fact the Congress has evidenced its desire and ability to prune this section of unneeded verbiage. At least twice the law was amended to eliminate surplusage.[2]

In addition to the violence which it does to the statutory language, the appellant's argument would thwart the purpose which the government ascribes to the requirement that a jury pass on the imposition of the death penalty. In its brief (note 5, page 9) the appellant indicates that the law as it now stands was favored over alternate proposals because "it took the onus of inflicting death from the judge." If the court must make its own decision in the final analysis anyway it is difficult to see how that onus is avoided.

The only authority cited by appellant representing the view that the jury's decision is not mandatory under the

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2 See 18 U.S.C.A. §1201, p. 113, "Historical and Revision Notes." Reference to persons aiding, abetting or causing was omitted as unnecessary because such persons are made principals by section 2 of Title 18. Still more significant for present purposes was the elimination of the words "upon conviction" preceding the sentencing provisions. This was done because punishment obviously cannot be imposed until a conviction is secured. If the government's reading of this statute were sustained, the phrase "unless the death penalty is imposed" would be equally unnecessary.

statute in question is *Robinson v. United States*, 264 F. Supp. 146 (W. D. Ky. 1967). That decision, however, is of little help in deciding the issue here. It was written after and with knowledge of the opinion of the court below in the present case and simply represents a conflict of opinion between two federal district courts. The view it espouses cannot be accepted.

B. *The Trial Court, Having Accepted A Plea of Guilty, or Having Heard The Case and Having Entered a Finding of Guilty, Is Not Authorized to Convene a Jury Solely For the Purpose of Imposing Sentence.*

The appellant, in support of its view that a jury may be convened for the limited purpose of imposing sentence, relies upon the decision of the Court of Appeals for the Seventh Circuit in *Seadlund v. United States*, 97 F.2d 742 (1938). Neither that case nor this issue have previously been submitted to the Court for determination. For the reasons hereinafter stated, it is our view that the *Seadlund* decision must be rejected.

It cannot be doubted that Congress knows how to provide for imposition of capital punishment when there is no jury to adjudge guilt. 18 U.S.C. §1992, which deals with the wrecking of trains, provides for the death penalty in certain circumstances "if the jury shall in its discretion so direct, or in the case of a plea of guilty, if the court in its discretion shall so order." Similarly, 18 U.S.C. §34 provides for the death penalty in certain situations where crimes involving aircraft, aircraft facilities or motor vehicles are committed. It reads,

> Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any

> person, shall be subject also to the death penalty or to imprisonment for life, *if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.* (Emphasis added)

The language employed by Congress in 18 U.S.C. §34 is particularly significant also because it evidently represents an awareness of precisely the problem now under discussion. In a letter to the Chairman of the House Committee on Interstate and Foreign Commerce, prior to the passage of the italicized provision, William P. Rogers, Deputy Attorney General, pointed out on behalf of the Justice Department that the bill then under consideration should be amended.

> Your attention is directed to the penalty provision of subsection (i). It is suggested that the phrase "or in the case of a plea of not guilty where the defendant has waived trial by jury," be added to the bill following the word "guilty" at line 20 on page 3. Under the present phraseology it is doubtful whether the court could invoke the death penalty in a situation where the defendant has entered a plea of not guilty, waived his right to trial by jury, and asked to be tried by the court.[3]

In the decade since the passage of 18 U.S.C. §34, Congress has displayed no desire to write similar provisions into the Kidnapping Act. This Court is hardly in a position to make the amendment on its own.

18 U.S.C. 1201(a) provides for the death penalty only "if the verdict of the jury shall so recommend." These words

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3 2 *U. S. Code Congressional and Administrative News*, 84th Congress, Second Session, 1956, pp. 3149-3150.

alone strongly suggest that only a jury rendering its decision on the issue of guilt is empowered to impose the death penalty. "The verdict" surely refers to the general verdict returned after a trial on the facts. This phrase combined with reference to *the* jury, as opposed to *a* jury, inescapably indicates that the statute contemplates one jury convened to pass on guilt and sentence, or no jury at all.[4]

Nor can it be claimed that the calling of a special jury as allowed under the *Seadlund* decision is a procedure equivalent to that referred to in the statute. In referring to "*the* jury," the statute envisions a jury which is burdened with the responsibility for determining guilt. Such a body may well be less likely to impose capital punishment than a jury which begins its deliberations with the court's assurance that the defendant is guilty. The defendant's jeopardy is increased under the *Seadlund* procedure also by the loss of rights after conviction which he would be free to exercise before a fact-finding jury. For example, the convicted defendant cannot successfully object to evidence, including alleged admissions, of other crimes unrelated to that of which he stands convicted.[5] Such evidence having been held proper, the defendant cannot complain of being forced to take the stand in order to defend himself against such additional allegations.[6] Decisions limiting the right of a defendant in post conviction proceedings to cross-examine those who provide information against him[7] or pass on his mental

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4 See *United States v. Curry*, 358 F.2d 904, 914 (2d 1965), wherein it was said that 1201 is one of several statutes under which the jury is given discretion as to whether the death sentence shall be imposed. The court concluded that "there is no indication that Congress thereby contemplated a two stage trial of guilt and sentence."

5 *United States v. Dalhover*, 96 F.2d 355, 360 (7th Cir. 1938), *certiorari denied*, 305 U. S. 632, involving the procedure for which the government contends, but under a different statute.

6 *Id.*

7 *Williams* v. *New York*, 337 U. S. 241 (1949).

fitness to receive sentence[8] further indicate the extent to which the *Seadlund* procedure may expose the defendant to disadvantages never contemplated by 1201(a).

Still other questions which the Congress might consider relevant in determining the desirability of authorizing such a procedure remain unanswered. Would the convicted defendant have a right to remain silent and not take the stand in a post conviction sentencing proceeding?[9] Would hearsay evidence be excluded? What rules of evidence would apply? Would the state have the right to challenge for cause those prospective jurors who objected to imposing the death penalty? Or is the state allowed to pick only those jurors, for the sole purpose of sentencing, who approve of capital punishment? Would the defendant have the right to counsel at a post conviction sentencing proceeding?[10] Could the defendant have illegally obtained evidence suppressed? Would the violation of the defendant's Fourth Amendment rights be sufficient to require the exclusion of evidence? Would the "verdict" of the jury have to be unanimous or could a majority of the jurors sentence the defendant to death? What would be the standard of proof in such a proceeding? What would the state have to prove? Would it have to prove it beyond a reasonable doubt? Could it prove it with a proponderance of the evidence?

If the statute in question authorizes a proceeding in which the defendant's rights become so uncertain, that result must seem surprising in light of the appellant's repeated assurance that the death penalty provisions of this act are intended to mitigate the risk of capital punishment.

It is not argued here that such considerations necessarily

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8 *Solesbee v. Balkcom*, 339 U. S. 9 (1950).

9 See *Beilan v. Board of Educ.*, 357 U. S. 399 (1958).

10 See *Mempha v. Rhay*, 416 P.2d 104 (Wash. 1966); *cert. granted*, 386 U. S. 907 (1967).

preclude an evenhanded procedure established by legislative authority which would leave all sentencing to juries, or all capital sentences to juries. The problem here is that the statute in question principally envisions a much different jury than that approved in *Seadlund*. The statute would have to be read to provide two very different types of procedures, one of which the Congress has yet to approve and which is not clearly implied by the terms of that law.

Perhaps the most conclusive objection to the special jury is that it is not possible under the procedure endorsed by the appellant to be assured that the special jury will render a free and independent decision in passing sentence. Under the law in question, according to the appellant's argument, a special jury will be convened only where a jury trial was not claimed in the first instance. The court, having entered a verdict of guilty after trial or after the receipt of a guilty plea, will make its independent decision as to whether a jury should be convened. If the jury's decision is to be binding on him, he will convene one *only* if he definitely wants the death penalty imposed. But even if he is thought to retain the discretion to disregard that decision, he will convene the jury only if he wants to impose capital punishment, or if he wants to keep that option open. Any jury worth its salt will contain members who can easily figure out these facts for themselves. Indeed, it is likely that their role in the sentencing procedure will be explained to them by the court in order that they might understand their responsibilities. Can there be any doubt that a jury possessing such a powerful indication of the judge's preferences would be influenced thereby in rendering its decision? If the jury has reason to believe that the court wants capital punishment imposed, it is very likely to follow that implicit recommendation. If the jury realizes only that the court would prefer not to have that alternative foreclosed, might the

jurors not succumb to the easy course of tossing the hot potato back into the court's lap with a recommendation of death? Any hope that such influence would be dispelled by special instructions to the jury is surely illusory. The requirement that the death penalty be imposed only upon the recommendation of the jury is hardly satisfied if the court injects its own implicit recommendation into the jury's deliberations.

None of these considerations is reflected in the *Seadlund* decision. Indeed the court there, without so much as a nod to the significance of its words, spoke of the statute as one by which,

> Congress unquestionably, intended to place a limitation upon the right of the court to impose the death penalty in that before so doing, an affirmative recommendation must be made by *a* jury. (Emphasis added)[11]

We submit that the statute should not be read to mean "*a* jury" when it says "*the* jury." It should not be read to authorize an ill-defined and uncertain proceeding where it was written with reference to one whose characteristics are well known. Nor should it be read to deny the accused a free and unfettered jury where his life is at stake.

II. *THE PRICE EXACTED BY THE KIDNAPPING ACT FOR THE EXERCISE OF A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS CONSTITUTES AN UNCONSTITUTIONAL BURDEN ON THE ASSERTION OF THOSE RIGHTS.*

The appellant asserts that the Kidnapping Act does not burden the assertion of the defendant's rights. It has been

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11 97 F.2d at 748.

demonstrated above that this is simply not so. Even under the assumptions most favorable to the government's argument a very real burden remains. Once it is clear that the underpinnings of the appellant's view will not hold up, the price tag on the rights of the accused grows still larger. The real thrust of the appellant's position, therefore, is that the burden imposed by this law is not unreasonable and not unconstitutional. Claiming that the procedure for imposing capital punishment operates "to mitigate the severity of punishment," (Brief page 7), the appellant asks the court to overlook the fact that such a procedure "may have the incidental effect of inducing defendants not to contest in full measure" (Brief page 9). An adequate safeguard is said to exist in that the trial judge will remain alert to the coercive effect of the statute and will "refuse to accept a plea or waiver that is not the product of unfettered choice." To say that the adequacy of such a safeguard is less than obvious is a massive understatement. Nor is the appellant's argument that the death penalty provisions in this statute are designed to favor the accused very conclusive. The appellant's own argument (note 5, pages 8 and 9) reveals that the capital provisions were added two years after the passage of the original act. This action could just as easily be interpreted as representing an attempt to supply a bit more incentive for defendants to waive their rights.

Whatever the purpose in the minds of the legislators, the effect of their decision is already clear. Under the decisions handed down by this and other courts in analogous situations, that effect is one which falls within the implied prohibitions of the United States Constitution.

This Court in *Fay v. Noia*, 372 U.S. 391 (1963), clearly recognized that the conditioning of a procedural right on the *possibility* of death, compared to the certainty of life imprisonment, is not to be lightly dismissed. In that case Noia

and two companions were convicted of murder. The companions were sentenced to death while Noia received only a life sentence. His companions were more than willing to appeal. But Noia faced a grim decision. If he appealed successfully he might be retried. If reconvicted, he could be sentenced to death. Understandably he chose not to appeal. His companions, however, were successful. The exclusion of their confessions prevented their re-conviction. Noia, feeling his legal position sufficiently improved to run the risk of the death penalty, attempted to appeal his own convicion. The state courts held him barred for failure to make a timely motion to appeal on the theory that he had waived his rights. This Court rejected the view of the state courts since Noia's decision not to appeal could hardly be considered the result of his own free choice.

> For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was a grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. . . . He declined to play Russian roulette in this fashion. 372 U.S. at 439-40.

The government now contends that a choice very similar to that facing the defendant in *Fay v. Noia* imposes no unreasonsable burden on the appellees' free choice. How heavy such a burden must be before the appellant would consider it unreasonable is hard to tell.

Other decisions of this Court and of lower federal courts and state courts have recognized in various contexts that the state may not put a price on the exercise of a constitutional right, the effect of which is to discourage, even indirectly, the assertion of those rights.

Griffin v. California, 380 U.S. 609 (1965), held that comment by a prosecutor on the failure of the accused to

testify unacceptably curtailed the exercise of the Fifth Amendment right of silence. The appellant here argues that *Griffin* is not on point because in the present case the requirement of a jury's recommendation before capital punishment can be imposed was devised to mitigate the severity of punishment, not to confound the defendant in exercising his rights. Even if that congressional intent were clear — and it is not — it could hardly justify curtailment of a constitutional right.

The principle adhered to in *Griffin* was implied in the earlier case of *Green v. United States*, 355 U.S. 184 (1957). There the petitioner had been convicted of arson and second degree murder. He was sentenced to a term of years in prison. After a successful appeal, remand and retrial, he was convicted again and sentenced to death. This court reversed the conviction on the capital charge of first degree murder as a violation of the prohibition against double jeopardy, holding that the greater crime had been included within the scope of the jury's consideration at the first trial. The verdict of guilty on second degree murder implied an acquittal of the first degree murder charge. Mr. Justice Frankfurter, however, pointed out in his dissent that the real holding of the Court was that the right to appeal could not be conditioned on the possibility that success could be rewarded with a heavier penalty.[12] The majority said as much in pointing out that,

> stated in the terms of this case, he [the defendant] must be willing to barter his constitutional protection against a second prosecution for an offense punishable by

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12 At least one commentator has concluded that the double jeopardy point served chiefly as a device for protecting Green's statutory right to appeal, rather than his constitutional right to be safe from repeated prosecution. Van Alystyne, "In Gideon's Wake," 74 *Yale L.J.* 606, 630 (1965).

> death as the price of successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of an erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. 355 U.S. at 193.

What was implicit in *Green* became explicit on the state level in the well-reasoned opinion of Justice Traynor in *People v. Henderson*, 60 Cal.2d 482, 386 P.2d 677 (1963). In a case factually similar to Green, the California court said that,

> A defendants' right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.[13] 386 P.2d at 686

Appellees urge this court to apply that principle to the present facts. The burden imposed on the rights here in question can hardly be thought less weighty than that imposed in the foregoing cases. Furthermore, it should be recalled that the right held to have been penalized in those decisions was a statutory right — the right of appeal. How much more cautious must we be to protect rights written into the Constitution.

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13 This principle was held applicable to the states through the due process clause of the Fourteenth Amendment by then Judge Mashall of the Second Circuit in *United States ex rel Hetenzi* v. *Williams*, 348 F.2d 844 (2d Cir. 1965).

Other cases have prohibited even the indirect restriction of constitutional rights by forcing a citizen to a choice between that right and some benefit. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), *Cramp v. Bd. of Public Instruction*, 368 U.S. 278 (1961), and *Wieman v. Updegraff*, 344 U.S. 183 (1952), held that the privilege of working for the state could not be conditioned upon loyalty oaths which, because of their vagueness and extreme breadth, might cause a teacher to be inhibited in the exercise of his First Amendment rights. Certainly the risk that the free exercise of a defendant's rights will be inhibited in the present case is no less significant than in those cases.[14]

Fifth Amendment rights were directly involved in *Slochower v. Board of Higher Educ.* 350 U.S. 551 (1956). There this court held that public employment could not be terminated by reason of the employee's assertion of his Fifth Amendment rights before a legislative committee. The exaction of such a price for the exercise of a fundamental right was held to be unconstitutional. How much clearer must be the case where the price is the increased risk of death.

The sound policy promoted by the cited decisions is that those fundamental rights which are preserved expressly or implicitly to the people by their Constitution are to be protected not only against their abolition, but against their piece-meal emasculation as well. No one contends here that the constitutional rights of the appellees should not be pre-

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14 See also, *Shelton v. Tucker*, 364 U. S. 479 (1960), holding that the state could not condition employment upon an overly broad requirement that the teacher disclose all his associations when the effect of such a requirement was to inhibit freedom of association; *Speiser* v. *Randall*, 357 U.S. 513 (1958), holding that the right to a tax exemption for veterans could not depend upon a condition that violated the constitutional presumption of innocence.

served. But the appellant's view if upheld would force the accused to think long and swallow hard before daring to assert them.

III. *ONCE THE EFFECT OF 18 U.S.C. 1201(a) IS HELD UNCONSTITUTIONAL, THE INDICTMENTS THEREUNDER MUST BE DISMISSED.*

Once it is decided that the Kidnapping Act, as it stands, imposes an unconstitutional burden on the assertion of a defendant's Fifth and Sixth Amendment rights, the court must either invalidate the entire section or re-write it into a constitutionally acceptable form. The appellant argues that the latter course is preferable. According to the government's brief, the obvious decision for the Court to make is to delete the provisions governing the imposition of capital punishment from the statute. But is that choice so clearly correct? We think not.

Deletion of capital punishment is, indeed, one possible way of removing the Kidnapping Act's constitutional infirmities. But the same result could be achieved by authorizing the trial court to impose capital punishment at its discretion in all cases, by making that penalty mandatory upon conviction, by rejecting all pleas and waivers and convening a jury to decide all issues in every case, or by convening a special jury to determine the imposition of the death penalty in all cases. In fact, assertion of the right to trial by jury could be encouraged by empowering only the jury to recommend clemency. It is doubtful that this Court would claim or desire the authority to select and establish any of the last five alternatives. But to accept the appellant's recommendation would be to amend and re-write this statute as surely as would the selection of any other alternative.

The Court below was correct in dismissing the first count of the charges against the defendants. The court was not in a position to rewrite the statute in order to sustain the indictment. The government now asks that this Court invalidate "only the offensive provision" of the statute. (Appellant's Brief 13) As authority for this position the appellant relies on *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932): ". . . the invalid part may be dropped if what is left is fully operative as a law." We agree with the Court's position in *Champlin*. We wish to point out, however, that the holding in *Champlin* will sustain only those statutes from which a whole section can be severed. *Champlin* does not stand for the proposition that a court, when declaring a provision invalid, should rewrite the statute by changing its terms, altering its procedures and amending the penalty so that the statute as a whole can survive. The principle in *Champlin* provides for severability only where (1) a whole section can be invalidated without affecting the other sections *and* (2) where Congress has specifically stated that any provision shall be considered severable from the act as a whole. What the government fails to point out, in relying on *Champlin* and *United States v. Harriss*, 347 U.S. 612, 627 (1954), is that in both of these cases the statutes involved contained severability provisions.[15]

In general, there are three ways for the Court to dispose of a case in which a statute or procedure has been declared

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15 In *Champlin*, immediately after the statement quoted by the appellant in this case, the Court went on to say,

> Section 10 declares that the invalidity of any part of the Act shall not in any manner affect the remaining portions. That discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained. . . . 286 U.S. at 235

In *United States* v. *Harriss*, also relied on by the appellant, the Federal Regulation of Lobbying Act also contained a separability provision.

unconstitutional: (1) It might sever and invalidate the offending provision or procedure, leaving the remainder of the statute intact; (2) It might invalidate the entire statute, or; (3) It might void the proceeding below, order it stripped of its objectional features, and remand. The third alternative has no application here. The Court is not now called upon to judge the propriety of a past proceeding. The first alternative is conceptually available here but, for the reasons set forth immediately below, it cannot be employed. Only the invalidation of the entire section can satisfactorily dispose of the statute's offensive characteristics without forcing the Court to make legislative decisions.

An offensive provision should be severed and invalidated separately only if two requirements are met: (a) The statute or procedure, when the invalid portion is removed, must remain unaffected in meaning and purpose, and (b) the statute should contain a separability provision indicating the legislature's opinion that half a loaf is better than none.

The *Champlin* decision provides a good example of a situation in which these requirements were satisfied. Out of an act with ten separate provisions only one was invalidated. The court did not have to rewrite the act. No alterations were necessary — no commas were moved, no decisions about penalties were made and the court amended no procedures. In addition, the act had a separability provision. The kidnapping law, however, is not like the statute in *Champlin*. To hold that the "remaining part" of the statute is still valid, this Court must make a number of legislative decisions. The provision in question is but a single sentence. The court must drop some words and move the punctuation marks. But more importantly, the court must perform the legislative function of deciding what the penalty provisions should be. Which of the half-dozen possible procedures should be adopted? Any of them would remove our

constitutional objections. The uncertainty which must accompany the selection of any available alternative is compounded by the absence of a separability clause. Where there is no separability clause, the presumption is against severance.[16]

This Court, then, should not rewrite Section 1201(a) but should declare that provision unconstitutional, affirm the judgment below, and leave it to Congress to rewrite the statute if it so desires.

Most cases before the Supreme Court where a statute has been declared invalid have been disposed of in this manner. If we are to take the appellant's suggestion seriously, we can only wonder why the Court did not rewrite the loyalty oath in *Cramp v. Board of Public Inst.*, 368 U.S. 278 (1961), in order to eliminate its vagueness. Why did this Court not rework the Feinberg Law in New York in order to preserve all the features not declared unconstitutional in its decision in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)? Also, it would have been a simple matter to shift the burden of proof onto the state in *Speiser v. Randall*, 351 U.S. 513 (1958), but this court did not perform the function of rewriting an unconstitutional statute to save the provisions not declared invalid. Could this Court have written a new disclosure statute in *Shelton v. Tucker*, 364 U.S. 479 (1960)? It did not. And this case should be disposed of in the same manner as the cases mentioned above.

The course recommended by the appellant requires second-guessing the Congress. Where the legislature has drafted a penal statute whose effect, intended or not, is to intimidate citizens in the exercise of their rights, it is some-

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16 *Electric Bond & Share Co. v. Commission*, 303 U. S. 419, 434 (1938).

what difficult to understand why this Court should wend its way through the subsections and sub-subsections of the offending statute, striking words and moving commas, in order to preserve as much of that law as the Congress might have done had it concerned itself earlier with the preservation of those rights.[17]

CONCLUSION

The judgment of the district court should be sustained.

Respectfully submitted,

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17 We wish to acknowledge the able and indispensable assistance of David Broiles, a student at the Yale Law School.